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IN THE

Supreme Court of the United States

TERM 1957

No. 422

CARLOS P. ENNIS,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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CARLOS P. ENNIS,
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vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

CARLOS P. ENNIS, the Petitioner herein, prays that a writ of certiorari be issued to review the final judgment and decree of the Supreme Court of the State of Florida entered in Case No. 28,285 in that Court, entitled, CARLOS P. ENNIS, Appellant, vs. State of Florida, Appellee, affirming the judgment and sentence of the Circuit Court of the Fifth Judicial Circuit In and For Marion County, Florida, rendered on June 14, 1956. The Jury returned a verdict of guilty under Count Two of the two counts submitted to them. The trial judge, under the second count which charged that petitioner did draw, make, utter, issue and deliver to Emmett E. Quarles, a certain check or written order for money, sentenced petitioner to be confined in the State prison of Florida at hard labor for the full term and period of three (3) years.

OPINIONS BELOW

The judgment and sentence of the Circuit Court of the Fifth Judicial Circuit In and For Marion County, Florida, has not been published in an official or unofficial report, but appears in Volume 1 of the record on page 5.

The opinion of the Supreme Court of Florida appears in (APPENDIX A, page 17), and the denial of rehearing by the Supreme Court of Florida appears in APPENDIX A, Page 31; said opinion is reported in case of *ENNIS* v. *STATE,* 95 So. (2d) 20

JURISDICTION

The opinion, judgment and decree of the Supreme Court of Florida was rendered and entered on the 27th day of March, A.D. 1957. (Appendix A page 17)

Timely application for rehearing was made on the 16th day of April A. D. 1957. (Appendix A page 29)

Application for rehearing was denied on June 3rd, A.D. 1957, (Appendix A, Page 31)

On application of petitioner, (Appendix A Page 32) the Chief Justice of the Supreme Court of Florida, on the 24th day of July, A.D. 1957, granted a stay of mandate to enable petitioner to apply for a writ of certiorari to this Honorable Court, said stay being for ninety (90) days. (Appendix A Page 36)

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3) which provides in part:

"By writ of certiorari, where the validity of a state statute is drawn in question on the ground it is repugnant to the constitution" . . . or where any title, right, privilege or immunity is especially set up or claimed under the Constitution, . . .

The following cases are believed to sustain the jurisdiction of this Court.

Chambers v. State of Florida 60 S Ct. 472; 309 U.S. 227; 84 So Ed. 716 and *New York ex rel Bryand v. Zimmerman,* 278 U.S. 63, 67, and cases cited; *Chicago Burlington & Quincy Railroad Co. v: Chicago,* 166, U.S. 226 at 231, 232.

The Supreme Court of the State of Florida is the highest Court of the State.

QUESTIONS PRESENTED FOR REVIEW

Question One:

IS FLORIDA STATUTE 832.05 REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE IT DEPRIVES THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO MEET THE WITNESSES AGAINST HIM FACE TO FACE?

Question Two:

WAS THE DEFENDANT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AS PROVIDED FOR IN AMENDMENT SIX, UNITED STATES CONSTITUTION, AND AMENDMENT FOURTEEN, UNITED STATES CONSTITUTION?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the sixth amendment, which in part provides:

> "In all criminal prosecutions, the accused shall enjoy the right to * * * be confronted with the witnesses against him * * *"

and the fourteenth amendment, which in part provides:

> "Nor shall any state deprive any person of life, liberty, or property, without due process of law * * *"

The Florida bad check law is *Section* 832.05, *Florida Statutes,* (Appendix B page 37).

STATEMENT OF THE CASE

On the 2nd day of March, A.D. 1956, the State of Florida filed an information against the Appellant, CARLOS P. ENNIS, charging him with the crime of larceny of automobile and worthless check, and alleged that the said CARLOS P. ENNIS did on the 30th day of January, A.D. 1956 with force and arms unlawfully take, steal, carry away and convert to his own use one 1953 four door sedan Chevrolet automobile of the property of EMMETT E. QUARLES, and in the second count that the Appellant, CARLOS P. ENNIS, on the 30th day of January, A.D. 1956, did make, utter, issue and deliver to EMMETT E. QUARLES a certain check or written order for money of the tenor following, to-wit:

LEESBURG, FLORIDA 1/30 1956 No.——

First National Bank of Leesburg, 63-72
631

Pay to the Order of EMMETT E. QUARLES $1,000.00

One Thousand and no 100th ..... Dollars

He, the said CARLOS P. ENNIS, then and there well knowing that he did not have sufficient funds on deposit in or credit with the said FIRST NATIONAL BANK OF LEESBURG, a banking corporation, with which to pay the said check when presented.

The Appellant was thereafter on the 3rd day of April, A.D. 1956, tried before the Court and a jury for the crimes of larceny of automobile and uttering worthless check and was duly acquitted of the crime of larceny of automobile but was convicted of uttering a worthless check.

The Appellant thereafter on the 14th day of June A.D. 1957, filed his Notice of Appeal.

FEDERAL QUESTIONS IN THE COURTS BELOW

A. In The Trial Court

At the trial as aforesaid, the State sought to introduce into evidence a dishonored check with an unsworn notation stating "No Account", attached thereto. The

Defendant objected strenuously to the introduction of said check in evidence with the above notation thereon. (Pages 16, 17, 18, 19, and 20, Transcript of Testimony)

BY MR. McCORMICK:

Q. I ask you if when this check was refused paid (sic) if the reason was given for its non-payment?

A. No account.

BY MR. RINEHART:

We object to the answer of the witness as being hearsay, and ask that it be stricken.

BY THE COURT:

The answer is not necessarily responsive to the question. Ask him the question again.

BY MR. McCORMICK:

Q. I asked you Mr. Quarles, if a reason was given by the bank for the non-payment of this check?

A. They checked it here "No Account".

BY MR. RINEHART:

Objected to as not being responsive to the question and as being hearsay.

BY MR. McCORMICK:

Q. You can answer that, Mr. Quarles, by a yes or no. Was a reason given for non-payment?

A. Oh, yes, sir, yes, sir.

Q. What was that reason?

BY MR. RINEHART:

Objected to as being hearsay.

BY THE COURT:

If the reason was given in accordance with the statutes, you don't have to ask what the reason was.

BY MR. McCORMICK:

Q. After presentment for payment of this check, Mr. Quarles, was it returned to you?

A. Yes sir.

Q. I ask you if this is the piece of paper that is attached to this check that was attached to it when it was returned to you? If that piece of paper was attached to the check?

A. Yes sir.

Q. I ask you what it says on that piece of paper.

BY MR. RINEHART:

Objected to as not being the best evidence.

BY THE COURT:

Well, he can read what it says. Go ahead.

A. It says "No Account."

Q. It is circled "No Account?"

A. Yes, sir.

Q. And this is the way it was returned to you?

A. Yes sir.

(Page 18 of Transcript of Record).

* * * * * * * *

BY MR. RINEHART:

Q. Can you testify, on oath, that this check has not been altered or changed since it was returned to you by the bank?

A. Yes, Sir.

Q. You have examined it thoroughly and you see no changes?

A. There's no changes in it.

Q. It is in exactly the same condition now as it was in when the bank returned it to you?

A. I can't say that I remember seeing this on there.

Q. Let the record reflect that the defendant is pointing to the words, "No Account. February 1st, 1956", with the initials "R.G.A."

(Page 20 of Transcript of Testimony).

* * * * * * * *

The issue of whether or not the check had been dishonored and the reason therefor was very material in this case because of the wording of *Florida Statute, Section* 832.05:

"It shall be unlawful for any person * * * to draw, make, utter, issue or deliver to another any check, * * * on any bank or depository for the payment of money or its equivalent, knowing at the time of the drawing, making, uttering, issuing or delivering such check or draft that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same on presentation;

"It shall be the duty of the drawee of any check, * * * before refusing to pay the same to the holder thereof, upon presentation; to cause to be written, printed, or stamped in plain language thereon, or attached thereto, the reason for drawee's dishonor or refusal to pay same. In all prosecutions under this section, the introduction in evidence of any unpaid and dishonored check, draft or other written order, having the drawee's refusal to pay stamped or written thereon, or attached thereto, with the reason therefor as aforesaid, shall be prima facie evidence of the making or uttering of said check, draft, or other written order and, the due presentation to the drawee for payment and the dishonor thereof, and that the same was properly dishonored for the reasons written, stamped, or attached by the drawee on such dishonored checks, drafts, or other written orders; and as against the maker or drawer thereof, the withdrawing from deposit with the drawee named in the check, draft, or other written order, the funds on deposit with such drawee necessary to insure payment of said check * * * upon presentation within a reasonable time after negotiation; or the drawing, making, uttering

> or delivering of a check, draft or written order, payment of which is refused by the drawee, shall be prima facie, evidence of knowledge of insufficient funds in or credit with such drawee; * * *

B. In The Supreme Court

In the Supreme Court of the State of Florida, petitioner continued to present the question of whether or not he had been deprived of his right to confront the witnesses against him face to face and to cross-examine them. Question one in appellant's brief was as follows: IS FLORIDA STATUTE 832.05 UNCONSTITUTIONAL BECAUSE IT DEPRIVES THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO MEET THE WITNESSES AGAINST HIM FACE TO FACE?. In Petitioner's brief filed before the Supreme Court of the State of Florida, the Petitioner specifically set out and argued that he had been deprived of the constitutional right to confrontation of witnesses as provided in the sixth amendment of the Federal Constitution.

It is clear that the Supreme Court of the State of Florida has decided a Federal question. In its opinion the Court stated:

> "It is argued by counsel for Defendant that Section 832.05 (5) * * * deprived the defendant of his constitutional right to meet witnesses against him face to face as provided in Section 11, Florida Declaration of Rights, F.S.A., and in the Sixth Amendment of the Federal Constitution. This contention has been adversely answered in the case of Shargaa v. State, 84 So. (2d) 42. (Appendix A, Page ——)

REASONS FOR GRANTING THE WRIT

As To Question One

It may be seen from the excerpt of Florida Statute 832.05 *supra*, that the prosecution may introduce into evidence the dishonored check with the drawee's reason for dishonor noted thereon. The said notation is unsworn and made in the absence of the Defendant. He is denied the right under this statute to confront the witness against him and to cross-examine him and is therefore liable to prosecution because of a banking error or mistake or neglect on the part of an employee of the bank.

This Honorable Court stated in *Chambers v. State of Florida*, 60 S.Ct. 472; 309 U.S. 227; 84 So. Ed. 716:

> "The due process" provision of the Fourteenth amendment, just as that in the Fifth, was intended to guarantee procedural standards adequate and appropriate to protect at all times people charged with or suspected of crime by those holding positions of power and authority.

The requirement of conforming to fundamental standards of procedure in criminal trials was made operative against the states by the Fourteenth Amendment.

This Court in *United States versus Douglas*, 155 Federal Reporter (2), 894, stated:

> "The submission to jury of information charging violation of Federal Food, Drug and Cosmetic Act while information had attached to it affidavits of two persons, one of whom was not called as a witness in the trial, which affidavits tended to prove the charge in its entirety, was a violation of defendant's constitutional right to be confronted with wit-

nesses against him of so serious a nature that it could not go unnoticed, even though error was not properly raised in trial court. Federal Food, Drug and Cosmetic Act, Section 1, et seq., 21 U.S.C.A. Section 301 et seq; U.S.C.A. Const. Amend 6, U.S. v. Douglas, 155 Federal Reporter (2) 894.

"If any principle is recognized in criminal law it is that a defendant in a criminal case is entitled to be confronted with all the witnesses against him. This is a common law right which was carried into the Constitution by the Sixth Amendment which provides that in all criminal prosecutions a defendant is to be confronted with the witnesses against him. The right of confrontation really means the right of the accused to hear the witnesses testify against him and to cross-examine them. U.S. v. Barracota et al. 45 F. Supp. 38

"Every accused person has the right to cross-examine on material facts every witness who testifies against him. This has been the rule ever since the law became certain and stabilized, and is a part of due process, which found its expression in the fifth and sixth amendments to the constitution. U.S. v. Keown, 19 F Supp. 639

"A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed and no conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel, or any other element of due process of law without which he cannot be deprived of life or liberty. Coplon v. U.S. 1951, 191, F. 2d 749, 89 U.S.A. App. D.C. 103 Certiorari denied 72 S. Ct. 363 342 U.S. 926, 96 L. Ed. 690, 2 mems.

* * * "The admission in evidence of a statement or deposition of a co-defendant, taken at the examining trial before a commissioner, which, if accepted by the jury as true, was sufficient to establish the guilt

of some if not all of the accused, was held to be in violation of the constitutional right of the defendants to be confronted with witnesses against them when it did not appear that the co-defendant was absent from the trial by the suggestion, procurement or act of the accused, but, on the contrary, his absence was manifestly due to the negligence of the officers of the government. Motes v. U.S. Ala. 1900, 20 S. Ct. 993, 178 U.S. 471, 44 L. Ed. 1150. . . ."

As To Question Number Two

It is obvious that *Florida Statute* 832.05 is repugnant to the Sixth Amendment to the Constitution of the United States in that it allows a bank officer or a teller to testify in absentia against the Defendant by presenting his written notation on a dishonored check and said check being introduced in evidence. Said Section deprived the Defendant of his right to cross-examine the witnesses against him and provided for the conviction and punishment of a man predicated solely on a banking error or a misunderstanding or even on the fraud of another. A reasonable extension of this statute would be the allowance of written testimony in other criminal cases and allow the prosecution of a man for murder solely on a written communication to the Trial Judge. It would create a prima facie case, destroy the presumption of innocence and place upon the accused the burden of establishing his innocence against secret charges and secret accusers. This statute is definitely contrary and repugnant to the common law right of cross-examination as expressed in the Sixth Amendment of the United States Constitution and made applicable to the states by the due process clause of the Fourteenth Amendment of the United States Constitution. With the loss of the right of cross-examination, a defendant is

denied one of the most essential and elemental requirements of due process. The Florida Supreme Court in a similar case based upon another Florida Statute stated:

> "Section 3 of the Statute attempts to make it the law of the state that the proof of the owning, holding or possession of a gambling stamp shall be sufficient evidence without explanation to convict of violation of the gambling laws. Thus it attempts to make it obligatory upon the jury after proof of the possession of the gambling stamps *unless the accused overcomes the presumption thereby raised.* Such a provision does remove from the obligation to prove Defendant's guilt beyond a reasonable doubt. The Court in the absence of a jury or a jury following an instruction by the trial judge upon Section 3 would be obliged to convict an accused, if he did not take the stand in his own defense * * *"

Jefferson vs. Sweat, 76 So. (2d) 494.

It may be seen on pages 16, 17, 18, 19, and 20 of the Transcript of Testimony, that the petitioner was denied in the Trial Court the right of cross-examination and objected numerous times to the introduction into evidence of the notation of the bank clerk for the reason that said notations were hearsay. The Court upheld the introduction into evidence of the bank clerk's notation under the authority of *Florida Statute* 832.05, even though the complaining witness could not testify that the notations allegedly made on the check by the bank teller were there prior to his delivery of said check to the sheriff's office for prosecution. Without that notation the state could not have prosecuted petitioner under *Florida Statute* 832.05 and petitioner was entitled to presume the state would not rely on hearsay testimony, on the statements of witnesses it did not plan to produce

at the trial. If the above mentioned notation was placed on the check in question by representative of the bank, it was done so in the absence of the petitioner.

The petitioner was entitled to rely on the state producing the witness at the trial so he could be subjected to cross-examination, for under the Florida Law as set forth in the case of *Shields vs. State,* 64 So (2d) 271, the Defendant is not entitled to know what witnesses the state will call to testify at the trial against him.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for writ of certiorari should be granted.

RALPH W. RINEHART,
Counsel for Petitioner
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Tampa, Florida

PROOF OF SERVICE

I hereby certify that I have mailed, by United States Airmail, postage prepaid, a copy of the foregoing Petition to Honorable Richard W. Ervin, Attorney General of the State of Florida, to his office in Tallahassee, Florida, on this the———day of———, A.D. 1957.

Attorney for Petitioner

APPENDIX A

THEREAFTER, on the 27th day of March, 1957, the Court filed its Opinion and Judgment as follows:

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1957
EN BANC

CARLOS P. ENNIS,
Appellant,
vs.
THE STATE OF FLORIDA,
Appellee.
CASE NO. 28,285

Opinion filed March 27, 1957

An appeal from the Circuit Court for Marion County, T. G. Futch, Judge

Ralph W. Rinehart for Appellant

Richard W. Ervin, Attorney General and Joseph P. Manners, Assistant Attorney General for Appellee

ROWE, Asociate Justice

On March 2, 1956 an information was filed in Marion County, charging the defendant (Appellant) in two counts, in the first count, "that Carlos P. Ennis, late of the County of Marion and State of Florida, on the 29th day of January, in the year of our Lord One Thousand Nine Hundred and 56, with force and arms at and in the county and state aforesaid did unlawfully take, steal, and carry away and convert to his own use, one 1953, 4-door Chevrolet automobile, of the property of Emmett E. Quarles.

SECOND COUNT

And the State Attorney aforesaid, upon his oath aforesaid, further information makes that Carlos P. Ennis, late of the County of Marion and of the State of Florida, on the 30th day of January, 1956, at and in said County and State, did draw, make, utter, issue and deliver to Emmett E. Quarles, a certain check or written order for money of the tenor following, to-wit:

Leesburg, Florida 1/30 1956 No.
First National Bank of Leesburg 63-72
631
Pay to the order of Emmett E. Quarles $1,000.00
One Thousand and NO/100 Dollars

he, the said Carlos P. Ennis, then and there well knowing that he did not have sufficient funds on deposit in or credit with the said First National Bank of Leesburg, a banking corporation, with which to pay said check when presented, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Florida."

Motion was made by defendant's counsel to quash the second count, and this motion was overruled. Another motion was made by said counsel to require the State to elect the statute under which the defendant would be prosecuted, and also, to elect upon which count of the information the defendant would be prosecuted, which motion was also, overruled.

The defendant was tried, and the jury returned a verdict of not guilty of larceny as charged in the first count, and guilty of the offence charged in the second count.

The defendant was adjudged guilty of and sentenced for the crime set forth in the second count.

An appeal has been taken by the defendant from the judgment and sentence. Several assignments of error have been urged but it is not necessary to discuss all of them. These questions are stated as follows:

Question I. Is Florida Statute 832.05 Unconstitutional because it deprives the defendant of his constitutional right to meet the witnesses against him face to face?

Question II. Is Florida Statute 832.05 Unconstitutional for the reason that it provides for imprisonment for debt without fraud and contrary to Section 16 of the Florida Declaration of Rights?

Question III. Did the court err in denying defendant's motion to compel the State to elect which count of the information under which it intended to prosecute the defendant?

Question IV. Did the court err in refusing to grant defendant's motion to quash the information?

Question V. Did the court err in its instructions to the jury?

We shall consider first Questions III., IV. and V.

Question III. In the case of Griswold v. State 82 So. at p. 49, cited by counsel for the defendant it is said: "If it (the indictment) had contained two inconsistent counts . . . . . it would have been subject to a motion to elect upon which count the defendant should be tried" citing Florida cases. It has not been

shown that the counts are inconsistent. One charges larceny and the other charge the giving of a worthless check. The testimony was to the effect that the check was given for a car, and by reason of the giving the check, which proved to be worthless, the car was procured. There was no inconsistency in the two counts. The defendant was found not guilty of the charge of larceny, and moreover he has not shown that he was in any wise prejudiced by the refusal to grant the motion to elect between the two counts.

Question IV. The information filed in this case, so far as the second count is concerned sets forth every essential element that may be required by the statute. It charges the offence substantially the same as is set forth in the case of Shargaa v. State 84 So. 2d p. 42.

Question V. No substantial error has been pointed out to any charge to the jury, and no objection seems to have been made in the court below to the charge for giving the worthless check for which defendant was found guilty.

Question I. Mr. Quarles, payee of the check, testified, over objection of counsel for the defendant, that the bank upon which the check was drawn returned the check to him unpaid, with a piece of paper attached saying thereon "no account, February 1st, 1956". The check and paper were introduced in evidence. The defendant contends that he was deprived of the right to cross examine the bank official who made the notation on the paper attached to the check. It is argued by counsel for the defendant that Section 832.05 (5) providing that:

"In all prosecutions under this section, the introduction in evidence of any unpaid and dishonored check, draft or other written order having the drawee's refusal to pay stamped or written thereon or attached thereto with the reason therefor as aforesaid, shall be prima facie evidence of the making or uttering of said check, draft or other written order and the due presentation to the drawee for payment and the dishonor thereof and that the same was properly dishonored, for the reason written, stamped or attached by the drawee on such dishonored check, draft or other written orders and as against the maker or the drawee thereof the withdrawing from deposit with the drawee named in the check, draft or other written order, the funds on deposit with such drawee necessary to insure payment of said check, draft or other written order upon presentation within a reasonable time after negotiation; or the drawing, uttering, making or delivery of a check, draft or other written order, payment of which is refused by the drawee, shall be prima facie evidence of knowledge of insufficient funds in or credit with such drawee . . . . "

deprived the defendant of his constitutional right to meet witnesses against him face to face as provided in Sec. 11 of the Florida Declaration of Rights, and in the 6th Amendment of the Federal Constitution. This contention has been adversely answered in the case of Shargaa v. State, 84 So. 2d p. 42, and see the citation thereunder. In the case now before us the evidence was sufficient to prove the corpus delicti, and also, a prima facie case under the second count of the information as required by Section 832.05(5) Florida Statutes of 1955.

Question II. Appellant contends that Section 832.05 Florida Statutes of 1955 is unconstitutional for the reason that it provides for imprisonment for debt without fraud and is contrary to Section 16 of the Florida Declaration of Rights. Paragraphs (1) and (2) of that statute are as follows:

"(1) PURPOSE.--The purpose of this section is to remedy the evil of giving checks, drafts, bills of exchange and other orders on a bank without first providing funds in or credit with the depository on which the same are made or drawn to pay and satisfy the same, which tends to create the circulation of worthless checks, drafts, bills of exchange and other orders on banks, bad banking, check kiting and a mischief to trade and commerce.

"(2) WORTHLESS CHECKS.—It shall be unlawful for any person, firm or corporation to draw, make, utter, issue or deliver to another any check, draft, or other written order on any bank or depository for the payment of money or its equivalent, knowing at the time of the drawing, making, uttering, issuing or delivering such check or draft that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same on presentation; provided, that this section shall not apply to any check where the payee or holder knows or has been expressly notified prior to the drawing or uttering of same or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment as aforesaid, nor shall this section apply to any post dated check."

It will be seen that the purpose of the legislature in the enactment of this statute was not for the collection of debts. The purpose was to penalize the evil of putting into circulation certain kinds of worthless commercial paper and thus causing mischief to banks and to trade and commerce. There seems to be no constitutional inhibition against a legislative act of this nature. A good result was no doubt intended by this legislation. It may be that some hardship will result from the enforcement of the act, and that also, some schemers will endeavor to use it for selfish motives, and indirectly to use same for the enforcement of a debt, but these possibilities are not sufficient to condemn the act as unconstitutional.

The constitutionality of this act has not been decided by this court. In the case of Anderson v. Bryson 115 So. 505 the court considered an act relating to the issuance of worthless checks and said that without the element of fraud, the act might be repugnant to Sec. 16 of the Declaration of Rights, but made no definite decision. We quote from Anderson v. Bryson 115 So. at p 506-7 as follows: "Chapter 9328, Laws of 1923, provides, in effect, that:

> "Any person who 'with intent to defraud, shall make, draw, utter or deliver any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time * * * * that the * * * * drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, or order in full upon its presentation, shall be guilty of a misdemeanor * * * * * * * *'

"The statute further provides that, as against the maker or drawer thereof, the making, drawing, uttering, or delivering by such maker or drawer of a check or other order, payment of which is refused by the drawer (drawee) because of insufficient funds, shall be prima facie evidence of the intent to defraud and of knowledge that the drawer has insufficient funds in or credit with the drawee.

"(2) Our statute just mentioned is closely analogous to the California statute (Pen. Code, Sec. 476a) on the same subject, and is almost identical with the Georgia statute of 1919 (Laws p. 220) See Hollis v. State 152 Ga. 182, 108 S. E. 783. The purpose of our statute is to restrain and punish fraudulent practices associated with the issuance of worthless checks, drafts, or equivalent orders for the payment of money, thereby preserving integrity of those classes of commercial paper in trade, commerce and other banking. Under our statute, the intent to defraud is an indispensable element of the offence. In that respect our statute differs materially from the Kansas statute construed in State v. Avery, 111 Kan. 588, 207 p. 838, 23 A. L. R. 453. Without the element of fraud the statute might be repugnant to section 16 of the Declaration of Rights, which provides that 'no person shall be imprisoned for debt, except in case of fraud.' "

In the case of State v. Yarboro, 194 N. C. 498, 140 S. E. 216, the court dealt with the validity of a statute substantially the same as the Florida Statute 832.05. The defendant, Yarboro was convicted upon a charge based upon the North Carolina statute. He made a motion in arrest of judgment upon the ground that

the statutory charge stated no criminal offence. The motion was granted. The State appealed, and the decision of the lower court was reversed. The North Carolina Statute is as follows:

> "Whereas, the common practice of giving checks, drafts, and bills of exchange, without providing funds in or credits with the depository on which the same are drawn to pay and satisfy the same, tends to create the circulation of worthless paper, overdrafts, bad banking, and check kiting, and a mischief to trade and commerce; and it being the purpose of this act to remedy this evil,
>
> "The General Assembly of North Carolina do enact:
>
> "Section 1. It shall be unlawful for any person, firm or corporation to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient funds on deposit or credit with such bank or depository with which to pay the same upon presentation." (Public Laws of North Carolina, 1927, c. 62)

In the opinion from State v. Yarboro it is stated: "We recognize the principle that the police power may not be exercised in breach of rights which are guaranteed by the Constitution of the state or nation; but if . . . . . the assailed statute is not in conflict with the fundamental law, its enactment was a lawful exercise of legislative power. The police power is a necessary attribute of every civilized government; it is not

a grant derived from or under any written constitution, but it is inherent in the several states. It is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the state, and by means of it the legislature exercises a supervision over matters involving the common weal and enforces the observance by each individual member of society of the duties which he owes to others and to the community at large. 6 R.C.L. p. 183, Section 184 . . . . . This attribute of sovereignty imports authority, not only to punish an injury which has become a public nuisance, but to punish fraudulent acts which tend to deceive, to destroy confidence, and to injure the public interests. Does the giving of worthless paper tend to deceive? Does the custom of putting it in the market places tend to destroy confidence? The transaction of business is dependent on credit; the basis of credit is confidence. The harmful effect of flooding the channels of commerce with checks and drafts of this character is manifest; it is not restricted to the bare transaction between the maker and the payee; its scope embraces the endorsement and the unrestrained transfer of the paper, releasing it as 'a courier without baggage' hastening perchance to the four corners of the country. The offence consists not in presently obtaining something of value by deceit, but in putting in circulation worthless commercial paper which will ultimately result in financial loss . . . . . The offence is completed only when a check or draft is made or drawn, etc. on any bank or depository for the payment of money or its equivalent, by one who knows at the time that he has not sufficient funds in or credit with such bank or depository with which to pay the paper when

presented; 'credit' meaning an arrangement or understanding with the bank or depository for the payment of the check or draft . . . . . .

"A statute almost identical with ours was construed by the Kansas Supreme Court in State v. Avery 111 Kan. 588, 207 p. 838, 23 A. L. R. 453. There the first count of the information was based on a check to the Dodge City Wholesale Grocery Company for $133.44. To this count the defendant pleaded guilty and moved in arrest of judgment on the ground that the count did not state facts sufficient to constitute a public offence. The motion was denied, and on appeal the ruling was affirmed, the court saying:

> 'The worthless check must be wilfully drawn, knowing at the time there are no funds on deposit to meet it. Beyond that, the legislature may, for protection of the public interest, require persons to act at their peril, and may punish the doing of a forbidden act without regard to the knowledge, intention, motive, or moral turpitude of the doer. There is no constitutional objection to such legislation, the necessity for which the legislature is authorized to determine. 'The defendant contends the statute is in conflict with paragraph 16 of the Bill of Rights, which forbids imprisonment for debt except in case of fraud. It is said the check was given to pay an acknowledged debt, long past due, and neither debtor nor creditor made or lost anything, but the debtor must be imprisoned because the debt was not discharged by check. The information does not disclose the consideration for the check. It may be conceded, however, the statute ap-

plies to a transaction of the character described. Nevertheless, the statute does not impose imprisonment for debt . . . . . .

The Yarboro case, supra has been cited with approval in

State v. Crawford (N. C.) 152 S. E. 504, 505

State v. Levy (N. C.) 18 S. E. 2d 355, 357

State v. White (N. C.) 53 S. E. 2d 436, 437

State v. Avery case, supra has been cited with approval in

State v. Gillen (Kan.) 99 P. 2d 832, 835

State v. Marshall (Kan.) 106 P. 2d 688, 689

State v. Bean (Kan.) 267 P. 2d 509, 514

Application of Windle (Kan.) 294 P. 213, 215

The Judgement is affirmed.

TERRELL, C. J., HOBSON, ROBERTS, DREW and THORNAL, JJ., Concur THOMAS, J., not participating

THEREAFTER, on the 16th day of April, 1957, the appellant filed his Petition for Rehearing as follows:

IN THE SUPREME COURT OF FLORIDA

CARLOS P. ENNIS,
Appellant,
vs.
THE STATE OF FLORIDA
Appellee.

CASE NO. 28,285

PETITION FOR REHEARING

To the Honorable Justices of the Supreme Court of the State of Florida:

Petitioner, CARLOS P. ENNIS, files this his petition for rehearing respectfully requesting this Honorable Court to reconsider its order filed herein on March 27, 1957, affirming the judgment of the Circuit Court In and For Marion County. As grounds for rehearing he respectfully suggests the following:

1. That the Court in arriving at its decision denied and overlooked Appellant's question number five, overlooked objection made by trial counsel to the instructions of its Court on Page 42, of the trial transcript of testimony.

2. That the Court in arriving at its decision apparently relied upon the case of Shargaa versus State 84 So. (2d) 42 concerning Appellant's question number one as to whether or not Florida Statutes 832.05 is unconstitutional for the reason that there was denied the Defendant the right of cross-examination.

It is respectfully submitted by Appellant the above cited case of Shargaa versus State 84 So. (2d) 42 that it did not decide this question.

WHEREFORE petitioner prays that he be granted a rehearing in this matter.

RALPH W. RINEHART
Attorney for Appellant
501½ Franklin Street
Tampa, Florida

I hereby certify that a copy of the foregoing has been furnished to Richard W. Ervin, Attorney General, State of Florida, by U.S. Mail, this 11th day of April, 1957.

THEREAFTER, on the 3rd day of June, 1957, the Court entered the following order:

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A.D. 1957
MONDAY, JUNE 3, A.D. 1957

CARLOS P. ENNIS,
Appellant
vs.
STATE OF FLORIDA,
Appellee

On consideration of the Petition for Rehearing filed by Counsel for Appellant,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

A true copy,

TEST:

Clerk Supreme Court

(THE MANDATE IN THIS CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT FOR MARION COUNTY)

Thereafter, on July 13, 1957, the appellant filed a Petition for Supersedeas bond, as follows:

BEFORE THE SUPREME COURT OF
THE STATE OF FLORIDA

CARLOS P. ENNIS,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

PETITION FOR SUPERSEDEAS BOND

COMES NOW, the Appellant, CARLOS P. ENNIS and moves this Honorable Court to set a reasonable supersedeas bond for the Appellant in the above styled cause and shows:

1) That on the 3rd day of April, A. D. 1956, Appellant, CARLOS P. ENNIS, was convicted of writing a worthless check in the Circuit Court of the Fifth Judicial Circuit In and For Marion County, Florida.

2) That on the 14th day of June, A. D. 1956, the Appellant filed his Notice of Appeal to this Court, appealing the aforesaid conviction.

3) That on the 5th day of February, oral argument was had before this Honorable Court in this cause.

4) That on the 27th day of March, A. D. 1957, this Court filed an opinion affirming the conviction of Appellant.

5) On the 11th day of April, A. D. 1957, Appellant filed a Petition for re-hearing.

6) That on the 3rd day of June, A. D. 1957, Appellant's Petition for re-hearing was denied.

7) Your Petitioner will further show that he plans to file Petition for Writ of Certiorari to the Supreme Court of the United States and will have filed said petition prior to the hearing on this Petition.

8) That the mother of Appellant, CARLOS P. ENNIS, is an aged woman who is totally disabled and requires the assistance of Appellant, CARLOS P. ENNIS, to care and provide for her.

9) That Appellant, CARLOS P. ENNIS, has deposited with the Sheriff of Marion County, a $1500.00 cash bond guaranteeing his presence for sentencing in this cause.

WHEREFORE, Appellant, CARLOS P. ENNIS, petitions this Honorable Court to set a reasonable Supersedeas Bond of $1500.00, so that he may remain free on bail to provide and care for his aged, crippled and infirm mother until his petition for Writ of Certiorari has been finally determined by the Supreme Court of the United States.

/s/ Ralph W. Rinehart

RALPH W. RINEHART
Attorney for Appellant
501½ Franklin Street
Tampa, Florida

CERTIFICATE OF SERVICE

I, RALPH W. RINEHART, do hereby certify that a copy of the above and foregoing, Petition for Supersedeas Bond, has been furnished to the Honorable RICHARD W. ERVIN, Attorney General, Attorney General's Office, Tallahassee, Florida, this *12th* day of July, A.D. 1957, by U.S. Mail.

/s/ Ralph W. Rinehart

BEFORE THE SUPREME COURT OF THE STATE OF FLORIDA

CARLOS P. ENNIS,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

NOTICE OF HEARING

TO: RICHARD W. ERVIN
Attorney General
Attorney General's Office
Tallahassee, Florida

YOU ARE HEREBY NOTIFIED that I will call for hearing the above-styled cause on the *22nd* day of *July*, A. D. 1957, at *9:00* o'clock a.m. before the Supreme Court of the State of Florida, on Appellant's Petition for Supersedeas Bond.

YOU WILL PLEASE GOVERN YOURSELF ACCORDINGLY.

/s/ Ralph W. Rinehart

RALPH W. RINEHART
Attorney for Appellant
501½ Franklin Street
Tampa, Florida

I HEREBY CERTIFY that a copy of the above Notice of Hearing has been furnished to Richard W. Ervin, Attorney General, Attorney General's Office, Tallahassee, Florida, this *22nd* day of *July*, A.D. 1957, by U.S. Mail.

/s/ Ralph W. Rinehart

THEREAFTER, on July 24, 1957, the Court entered a Stay of Order as follows:

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1957

WEDNESDAY, JULY 24, 1957

CARLOS P. ENNIS,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

On application of the appellant it is ordered that execution and enforcement of the judgment of this Court rendered herein on March 27, 1957, petition for rehearing denied on June 3, 1957, be and is hereby stayed for ninety days from June 3, 1957, to enable the appellant to have a reasonable time in which to apply for and to obtain, if he can, a review of the cause by the Supreme Court of the United States. This order is subject to cancellation at any time if appellant fails to prosecute proceedings for review with reasonable dispatch.

APPENDIX B

FLORIDA STATUTE 832.05

832.05 KNOWINGLY MAKING, ISSUING, ETC., WORTHLESS CHECKS, DRAFTS: DUTY OF DRAWEE: EVIDENCE: PENALTY

(1) *Purpose.*—The purpose of this section is to remedy the evil of giving checks, drafts, bill of exchange and other orders on a bank without first providing funds in or credit with the depository on which the same are made or drawn to pay and satisfy the same, which tends to create the circulation of worthless checks, drafts, bills of exchange and other orders on banks, bad banking, check kiting and a mischief to trade and commerce.

(2) *Worthless checks.*—It shall be unlawful for any person, firm or corporation to draw, make, utter, issue or deliver to another any check, draft, or other written order on any bank or depository for the payment of money or its equivalent, knowing at the time of the drawing, making, uttering, issuing or delivering such check or draft that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same on presentation; provided, that this section shall not apply to any check where the payee or holder knows or has been expressly notified prior to the drawing or uttering of same or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment as aforesaid, nor shall this section apply to any post dated check.

(3) *Obtaining property in return for worthless checks, etc*—It shall be unlawful for any person, firm or corporation to obtain any services, goods, wares or other

things of value by means of a check, draft or other written order upon any bank, person, firm or corporation, knowing at the time of the making, drawing, uttering, issuing or delivering of said check or draft that the maker thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation, provided however that no crime may be charged in respect to the giving of any such check or draft or other written order where the payee knows or has been expressly notified or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment thereof.

(4) The word "credit" as used herein shall be construed to mean an arrangement or understanding with the drawee for the payment of such check, draft or other written order.

(5) It shall be the duty of the drawee of any check, draft, or other written order, before refusing to pay the same to the holder thereof, upon presentation, to cause to be written, printed, or stamped in plain language thereon, or attached thereto, the reason for drawee's dishonor or refusal to pay same. In all prosecutions under this section, the introduction in evidence of any unpaid and dishonored check, draft or other written order, having the drawee's refusal to pay stamped or written thereon, or attached thereto, with the reason therefor as aforesaid, shall be prima facie evidence of the making or uttering of said check, draft, or other written order, and the due presentation to the drawee for payment and the dishonor thereof, and that the same was properly dishonored for the reason written, stamped or attached by the drawee on such dishonored checks, draft, or other written orders; and, as against the maker

or drawer thereof, the withdrawing from deposit with the drawee named in the check, or other written order, the funds on deposit with such drawee necessary to insure payment of said check, draft or other written order upon presentation within a reasonable time after negotiation; or the drawing, making, uttering or delivering of a check, draft or written order, payment of which is refused by the drawee, shall be prima facie evidence of knowledge of insufficient funds in or credit with such drawee; provided, however, if it is determined at the trial in a prosecution hereunder, that the payee of any such check, draft, or written order at the time of accepting such check, draft or written order, had knowledge of or reason to believe that the drawee of such check, draft or written order did not have sufficient funds on deposit in or credit with such payee bank, then the payee instituting such criminal prosecution shall be assessed all costs of court incurred in connection with such prosecution.

(6) *Penalty*

(a) Any person violating the provisions of this section shall be punished in the same manner as provided by law for punishment for the crime of larceny.

(b) Payment of a dishonored check, draft, bill of exchange or other orders shall not constitute a defense or ground for dismissal of charges brought under this section.

(7) This section shall not be construed to repeal Sections 832.01, 832.02 and 832.03, but shall be deemed to be cumulative and additional thereto. Laws 1953, c. 28096, Sections 1, 2, as amended Laws 1955, c. 29615, Section 33.